Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UNITED KINGDOM (OLADELE RAJI),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the desire for comity and reciprocity between the United States and friendly nations upon which the letter rogatory statute, 28 U.S.C. § 1782, is based, required the courts below to treat as paramount the statute's avowed aim of providing assistance to foreign tribunals and litigants and, accordingly, to interpret the wiretap statute, 18 U.S.C. §§ 2510-2520, in a manner to promote, rather than hinder, the provision of such assistance?

II. Whether the rights of litigants to disclosure of lawfully obtained wiretap information were infringed by the lower courts' delegation of authority to the government to veto such disclosure, especially given the absence of any genuine "privacy concerns" or threatened harm to law enforcement interests and the prior disclosure of the wiretap evidence in the public record?

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PETITION FOR WRIT OF CERTIORARI

Petitioner United Kingdom (Oladele Raji) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in case number 00-1114, which affirmed orders of the United States District Court for the Southern District of Florida declining to compel disclosure of materials in the possession of the United States government sought through letter-rogatory requests issued by the English court in which Raji faces criminal prosecution.

OPINIONS BELOW

The opinion of the court of appeals is reported at 238 F.3d 1312 and is also reproduced in the Appendix at App. 1-26. The unreported orders of the district court upheld by the court of appeals are reproduced in the Appendix at App. 30-36 (magistrate's report and recommendation), App. 29 (order affirming report and recommendation) and App. 27-28 (amended order adopting report and recommendation).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) and Part III of the Supreme Court Rules. The district court had jurisdiction because Petitioner sought discovery of materials in the possession of the United States government through letters rogatory

issued by a foreign tribunal, as provided for in 28 U.S.C. § 1782(a). The court of appeals had jurisdiction pursuant to 28 U.S.C. 1291 which gives courts of appeals jurisdiction over all final orders of United States district courts. The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 16, 2001, upon denial of Petitioner's request for rehearing *en banc*. This Petition is therefore timely filed pursuant to Sup. Ct. R. 13(3).

APPLICABLE PROVISIONS OF LAW

This case involves the following statutory and treaty provisions, which are reproduced in the Appendix as noted:

18 U.S.C. § 2510(6) and (7) (App. 39);

18 U.S.C. § 2515 (App. 39);

18 U.S.C. § 2517 (App. 40-41);

18 U.S.C. § 2518(10)(a) (App. 41-42);

18 U.S.C. § 2520(a) (App. 42);

28 U.S.C. § 1782 (App. 43); and

Treaty on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. No. 104-2, 1994 WL 855115, preamble and Articles 1, 2, and 19 (App. 44-46).

STATEMENT OF THE CASE

This Petition arises from a criminal indictment brought in England by the Crown Prosecution Service ("CPS") against Oladele Raji, Frank Martins[1] and four other persons (collectively "the English defendants"). The indictment alleges that the English defendants conspired to commit fraud upon American Express by the unauthorized use of American Express credit card numbers. While Raji and Martins still await trial on this indictment, the other English defendants have pled guilty to it.

Also named but not charged in the English indictment are a number of alleged American co-conspirators who had previously been indicted on similar charges in the Southern District of Florida in what is known as the *Ojomo* case. Most of the alleged American conspirators in the *Ojomo* case have pled guilty and been sentenced to various terms of imprisonment, although one is fighting extradition from England.

Raji and Martins, relying on the positive duty of disclosure owed to them by the CPS under English law, applied to their English judge for the issuance of letters rogatory seeking disclosure of information, documents, tapes and other materials relating to the *Ojomo* case in the possession of the United States government. The English judge granted the applications and issued the requested letters rogatory on February 8, 1999 (App. 65-69) and February 26, 1999 (App. 57-64), addressed to the United States District Court for the Southern District of Florida

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[1] Martins was a co-appellant below.

as the competent judicial authority in the United States. These letters rogatory were transmitted to the district court by the United States Department of State, which received the letters *via* a diplomatic note from the British embassy, serving as conduit for the Secretary of State for the Home Department of the United Kingdom. (*See* App. 70-72).

Pursuant to the letters rogatory, a hearing was held before the district court on July 14, 1999, at which the prosecutor in the *Ojomo* case appeared and agreed to disclose a number of the requested items, subject to receiving the district court's permission to do so. (*See* App. 74). Thereafter, on July 20, 1999, the district court entered an order authorizing those agreed disclosures, including disclosure of a number of tapes of wiretapped conversations. (App. 55-56).

On August 5, 1999, also pursuant to the letters rogatory, the deposition of the lead defendant in the *Ojomo* case was taken. Following that deposition, the government provided the CPS with additional material, including wiretap transcripts, to assist the CPS in impeaching the credibility of Ojomo's deposition testimony. Once in the possession of the CPS, these transcripts were made available to the English defendants in accordance with English discovery law.

Subsequent to Ojomo's deposition, the government provided the CPS with access to and the opportunity to review voluminous materials, including files and boxes of wiretap evidence and other investigative materials, gathered in the investigation of the *Ojomo* case. On August 20, 1999, the CPS, as part of its continuing duty of disclosure

under English law, served on the English defendants a disclosure schedule listing these materials – some 240 items, including thousands of tapes of wiretapped conversations – which the CPS had reviewed but which remained in the possession of the United States government. Raji and Martins responded by applying to the district court for disclosure of all of these items, pursuant to the extant letters rogatory.

The district court's reply, by order dated October 4, 1999, was to explain that it stood "ready to respond to any request issued by its sister court in Britain," "[i]f the parties can demonstrate to [the] satisfaction [of the English judge] that the interests of justice would be served by additional discovery in the United States." (App. 53-54). Thereafter, on October 8, 1999, the English judge ruled that all the items listed on the CPS disclosure schedule were relevant and disclosable in the English case, and, accordingly, issued an order declaring the English defendants were "entitled to the[ir] disclosure," subject to any privilege "as may be . . . upheld by the appropriate American judicial authority." (App. 52).

Citing this authority and the letters rogatory, Raji and Martins again moved in the district court for disclosure of all of the items on the CPS disclosure schedule, including, in particular, the wiretap evidence. At the hearing on this motion, held on October 21, 1999, before the magistrate judge, the government acknowledged that disclosure of the wiretap evidence would not "hurt"or "jeopardize" any pending investigation as the investigation into the *Ojomo* case was already "complete" and that, in fact, this evidence had been already disclosed to the *Ojomo* defendants in discovery prior to their guilty pleas. (*See* App.

73-74). Additionally, the CPS submitted a letter (App. 47-51) explaining that although its position was "one of neutrality," it "hope[d]" that all of the material on its disclosure schedule would be disclosed to Raji and Martins so as to obviate any determination by the English judge that these defendants were prejudiced or that an "abuse of process" had occurred. (App. 50). Nonetheless, the government opposed disclosure of all but a few selected items.

The post-hearing report and recommendation issued by the magistrate judge, while approving disclosure of the few items the government voluntarily agreed to disclose, recommended against disclosure of the vast majority of the items on the CPS disclosure schedule, including, in particular, transcripts and tapes of the wiretapped conversations. (App. 35-36). The report and recommendation was affirmed by the district court without a hearing by an order dated November 18, 1999 (App. 27-28) and an amended order dated December 3, 1999 (App. 28).

Raji and Martins appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. Petitioner United Kingdom (Oladele Raji) argued that 28 U.S.C. § 1782, the letter rogatory statute, authorizes the disclosure of the investigative material sought in this case and that no proper claim of privilege exists to the contrary; that the wiretap statute, 18 U.S.C. §§ 2510-2520, properly interpreted in conjunction with 28 U.S.C. § 1782 and with international provisions, such as the United States-United Kingdom Treaty on Mutual Legal Assistance in Criminal Matters, permits disclosure of wiretap material to the CPS – which, in turn, would

result in disclosure to the English defendants; and that the government's voluntary disclosures of some wiretap material estopped it from asserting a blanket refusal to disclose such material.

By opinion dated January 19, 2001, *rehearing denied*, April 16, 2001, the court of appeals affirmed the orders of the district court. (App. 1-26). The court of appeals held that a "district's court's compliance with a § 1782 request is not mandatory, contrary to Appellants' repeated suggestions, and the district court was not obliged to grant their application simply by virtue of the English court's order or for any other reason." (App. 12-13). The court also held that the district court had broad discretion in granting judicial assistance to foreign countries, with appellate "review of the district court's discretion in this case . . . [being] extremely limited and deferential." (App. 13).

Regarding the sought-after wiretap information, the court of appeals held that although § 2517(1) authorizes law enforcement officers to disclose lawfully obtained wiretap information to other law enforcement officers, no language in the wiretap statutes "or elsewhere" suggests or indicates that § 2517(1) encompasses *foreign* law enforcement officers. (App. 22-23). To reach this result, the court relied on § 2510(7), in which "[i]nvestigative or law enforcement officer" is defined as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." (App. 23). Furthermore, the court held that although § 2517(2)

authorizes any law enforcement officer to disclose lawfully obtained wiretap information as "is appropriate to the proper performance of his official duties," the court could not "order this disclosure over the objection of the Government." (App. 23-24). Finally, the court held that even if a federal court otherwise had discretion to order the government to disclose the type of wiretap information requested here, the district court did not abuse its discretion in declining to do so, given, *inter alia*, that the information sought had not been "made public." (App. 24).

Petitioner United Kingdom (Oladele Raji) now seeks this Court's discretionary writ of certiorari. This case poses important questions which have not previously been considered by this Court with regard to the granting of letter-rogatory requests and the avowed aim of Congress to promote comity between friendly nations. This case also poses important questions with regard to the proper interpretation of the disclosure provisions of the wiretap statute where neither privacy interests nor law enforcement interests are at risk and the wiretap evidence has been disclosed in the public record. In this regard, the decision of the courts below conflicts with decisions of other courts of appeals.

REASONS FOR GRANTING THE WRIT

I. IGNORING THE DESIRE FOR COMITY AND RECIPROCITY BETWEEN THE UNITED STATES AND FRIENDLY NATIONS UPON WHICH THE LETTER ROGATORY STATUTE, 28 U.S.C. § 1782, IS BASED, THE COURTS BELOW FAILED TO TREAT AS PARAMOUNT THAT STATUTE'S AVOWED AIM TO PROVIDE ASSISTANCE TO FOREIGN TRIBUNALS AND LITIGANTS AND FURTHER FAILED TO INTERPRET THE WIRETAP STATUTE, 18 U.S.C. §§ 2510-2520, IN A MANNER TO PROMOTE, RATHER THAN HINDER, THE PROVISION OF SUCH ASSISTANCE.

Title 28 U.S.C. § 1782, captioned "Assistance to foreign and international tribunals and to litigants before such tribunals," makes provision for the United States courts to respond favorably to requests from foreign tribunals or interested foreign persons, by way of letters rogatory, to obtain discovery or other evidence in this country for use in foreign tribunals. Under this statute, district courts are authorized to deal with such requests in the first instance.

In enacting § 1782, Congress affirmed "the inherent authority of the United States district courts to grant international judicial assistance." *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). In order to provide such assistance in foreign litigation where there is potential evidentiary material in the United States, Congress enacted § 1782 so as to "strengthen the power of district courts to respond to

requests for international assistance." *In re Lo Ka Chun*, 858 F.2d 1564, 1565 (11th Cir. 1988); *Trinidad and Tobago*, 848 F.2d at 1154. Indeed, the goal of Congress in enacting § 1782 was to revise the law so as to provide "[w]ide judicial assistance . . . on a wholly unilateral basis." *In re Letter Rogatory from Justice Court, District of Montreal, Canada*, 523 F.2d 562, 565 (6th Cir. 1975), quoting Amram, *New Developments in International Judicial Assistance in the United States of America*, 32 J.B. Ass'n of D.C. 24, 28 (1965).

There are powerful reasons for the Congressional desire to strengthen the tools and ambit of § 1782. The "twin goals" of this statute are "[1] providing efficient means of assistance to participants in international litigation in our federal courts and [2] encouraging foreign countries by example to provide similar means of assistance to our courts." *Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir.), *cert. denied*, 506 U.S. 861 (1992); *Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996) [citations omitted]. The importance of these "twin goals" is reflected in this case.

Here, on the one hand, while opposing almost all of the requests for information made by Raji and Martins, the United States government took steps to assist the government of the United Kingdom, specifically the CPS, by voluntarily providing the CPS with tapes of wiretapped conversations helpful to the CPS, and, furthermore, making all of its voluminous investigative materials relating to the *Ojomo* case available to the CPS. On the other hand, the United States needed and has obtained assistance from the courts of England, as well as

from the CPS, in its effort to extradite a defendant in the *Ojomo* case who fled to England from the United States.

Nor can there be any doubt that, if disclosed, the discovery sought by Petitioner would provide important "assistance to participants in international litigation." Most simply stated, "[t]he legislative purpose of 28 U.S.C. § 1782 is to assist foreign tribunals in resolving foreign disputes." *In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-Au-Prince, Republic of Haiti*, 669 F.Supp. 403, 407 (S.D.Fla. 1987). Here, the pronouncements and actions of the English judge reflect his determination that the requested information would, in fact, assist in resolving the dispute – i.e., the criminal charges – before that tribunal. Indeed, the very fact that the English judge has adjourned the criminal trial so as to permit Petitioner every opportunity to obtain the sought-after discovery here underscores the importance to the English tribunal of obtaining that discovery.

To fully effectuate the "twin goals" of § 1782 in this case, the court of appeals should have interpreted the wiretap statute in a way to promote, not hinder, the assistance sought by the English tribunal. *Cf. Grunfeder v. Heckler*, 748 F.2d 503, 509 (9th Cir. 1984) (*en banc*) ("Absent an expression of congressional intent to the contrary, considerations of courtesy and mutuality require [United States] courts to construe domestic legislation in a way that minimizes interference with the purpose or effect of foreign law.") This the courts below did not do.

Thus, rather than simply relying on the definition of law enforcement officer in § 2510(7) to exclude foreign law enforcement officers from the reach of § 2517(1)

(App. 22-23), the court of appeals, recognizing that Congressional intent to permit disclosure to foreign enforcement agents under § 2517(1) *could* be found "elsewhere," outside of the wiretap statute (App. 23), should have *looked* "elsewhere" for it. For such an intent is, indeed, found "elsewhere." In particular, it is found in the self-executing treaty between the governments of the United States and the United Kingdom on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. No. 104-2 ("MLAT"), 1994 WL 855115 – a treaty that commits our two nations to mutual assistance between "law enforcement authorities" precisely in such matters as "providing documents, records and evidence" for purposes of proceedings in criminal cases. MLAT, preamble, Articles 1(1)(b) and 19(1).

While the requests for information made pursuant to the letters rogatory in this case do not conform to the procedural requirements of the MLAT treaty (*see* App. 7-9), nonetheless the existence of that treaty and its implications for domestic legislation cannot be ignored – especially given that the letters rogatory were actually transmitted from the English tribunal to the district court by the United Kingdom's "central authority" for purposes of the MLAT treaty. *See* MLAT, Article 2 (designating the Secretary of State for the Home Department as the United Kingdom's "central authority"). Surely, if statutory domestic law, such as the wiretap statute, can be interpreted in a way that would give effect to the MLAT treaty and to this nation's international obligations under that treaty, while at the same time promoting the "twin goals" of § 1782, rather than give rise to inconsistency or conflict with those provisions, then that interpretation

should be embraced. The court of appeals erred in failing to do so.

So, too, the court of appeals could have readily held that § 2517(2), which permits a law enforcement officer to disclose lawfully obtained wiretap information as "is appropriate to the proper performance of his official duties," effectively authorizes the disclosure sought by Petitioner here. Both the prosecutor and lead detective in the *Ojomo* case are due to give evidence at Raji's and Martins' trial in England. And both these law enforcement officers must know the contents of most of the material sought by the Petitioner, including the wiretap contents, as that material constituted the government's central evidence in the *Ojomo* case. Since "the proper performance of [their] official duties" surely requires these law enforcement officers to give evidence honestly and with candor regarding *all* relevant information within their knowledge, they are clearly authorized by the plain language of § 2517(2) to disclose whatever wiretap information they possess, as the letters rogatory request. By failing to interpret § 2517(2) to authorize such disclosure, the court of appeals erred.

Moreover, by holding that § 2517(2) did not "*permit* the court to order . . . disclosure over the objection of the Government" (App. 23 (emphasis added)), the court of appeals delegated to the government the power to decide what evidence the English tribunal could receive in this case – a clearly improper delegation under § 1782 which bestows that power upon the district court, not upon the party in possession of the evidence sought. By this holding, the court of appeals not only failed to give due

consideration to the legislative purpose of providing assistance to foreign tribunals and litigants; it also erected an unprecedented obstacle to the fulfilment of that statutory aim.[2]

Reciprocity is the very essence of § 1782. It is the aim of this statute to facilitate foreign litigation through discovery of documents and other evidentiary material so that foreign nations seeking such assistance will return the courtesy by facilitating requests for information made by the United States. "[T]he statute envision[s] considerable cooperation with foreign courts' requests for assistance and a general practice of reciprocity." *In re Letter of Request from Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 592 (4th Cir. 1996). Indeed, "examining a request for information from a foreign court for its discoverability is both unnecessary and would thwart efforts to foster international cooperation." *In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 311 (5th Cir. 1995).

Petitioner does not suggest that a district court's compliance with a request made under § 1782 is mandatory. Rather, Petitioner submits that absent some extraordinary circumstance, such as bad faith or other unreasonable conduct, a district court is obliged to take into consideration the legislative history and intent of this statute and, accordingly, wherever possible, respond favorably to a request for assistance in a foreign judicial

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[2] As discussed in Argument II below, the court of appeals also gave improper deference to putative "privacy concerns" raised by the government as a justification for denying disclosure. (*See* App. 25).

proceeding. *Cf. Euromepa S.A. v. R. Esmerian Inc.*, 51 F.3d 1095, 1101 n.6 (2d Cir. 1995) ("[I]f the district court determines that a party's discovery application under section 1782 is made in bad faith, for the purpose of harassment, or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application in *toto*, just as it can if discovery was sought in bad faith in domestic litigation.")

Moreover, the district court's duty to respond favorably to a letter-rogatory request is particularly compelling where, as here, the request is made directly by a foreign tribunal and transmitted by and with the approval of a friendly foreign government, rather than by private litigants. Various concerns that may mitigate against a favorable response when a private litigant submits a letter rogatory seeking discovery "are not at all implicated when, as here, a foreign court requests assistance in obtaining discovery. After all, 'the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules.' " *Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d at 592, quoting *First Court, Caracas, Venezuela*, 42 F.3d at 311. While the court of appeals, like the district court before it, appears to have treated the letters rogatory in this case as if generated by private litigants, the record is clear that this was not so: The letters rogatory not only emanated from a judicial tribunal, but they carried the weight of official sanction and approval by a foreign government with whom the United States maintains close, collegial relations and has even entered into a treaty to provide mutual assistance in criminal matters.

Given the absence of any indication that granting Petitioner's request would be at variance with the legislative intent of § 1782 or would in any way interfere with foreign relations, the district court's discretion should have been exercised favorably in this case. The failure of the court of appeals to treat as paramount § 1782's avowed aim of providing assistance to foreign tribunals and litigants – indeed, its complete disregard of the principle of comity and the "practice of reciprocity" between friendly nations – requires this Court's intervention.

II. PETITIONER'S RIGHT TO DISCLOSURE OF LAWFULLY OBTAINED WIRETAP INFORMATION WAS INFRINGED BY THE LOWER COURTS' DELEGATION OF AUTHORITY TO THE GOVERNMENT TO VETO SUCH DISCLOSURE, ESPECIALLY GIVEN THE ABSENCE OF ANY GENUINE "PRIVACY CONCERNS" OR THREATENED HARM TO LAW ENFORCEMENT INTERESTS AND THE PRIOR DISCLOSURE OF THE WIRETAP EVIDENCE IN THE PUBLIC RECORD.

The court of appeals' holding that, under the wiretap statute, it is not "permit[ted] . . . to order . . . disclosure over the objection of the Government" (App. 23 (emphasis added)), not only delegated to the government the court's power under § 1782 to decide what evidence the English tribunal could receive in this case, as discussed above; it also delegated to the government the power to determine whether lawfully obtained wiretap evidence would, or would not, be disclosed pursuant to §§ 2510-2520. This delegation – which, in effect, hands the

government a veto over the disclosure decision – stands the wiretap statute on its head.

That statute, enacted to balance law enforcement and privacy interests in accordance with the Fourth Amendment standards set forth in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347, 355 (1967),[3] embodies the recognition that the procurement and use of electronic surveillance demands close *judicial* supervision. As *Katz* succinctly said, "the mandate of the (Fourth) Amendment requires adherence to judicial processes." 389 U.S. at 357. Indeed, in passing the wiretap statute, Congress specifically found that electronic surveillance "should be allowed only when authorized by a court of competent jurisdiction and should *remain under the control and supervision of the authorizing court.*" Title III – Wiretapping and Electronic Surveillance: Findings, Pub. L. No. 90-351 § 801(b), 82 Stat.211 (1968) (emphasis added).

To be sure, §§ 2517(1) and (2) provide that a law enforcement officer "*may* disclose" lawfully obtained wiretap evidence to another law enforcement officer or as "is appropriate to the proper performance of his official duties." However, the permission to disclose granted by those subsections does not "write out of existence the role of the court" in deciding when the exercise of such permission is appropriate. *See Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015, 1019-1020 n.5 (8th Cir.

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[3] Congress specifically drafted the wiretap statute to conform to the standards in *Berger* and *Katz*. Sen. Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2nd Sess., 2112, 2153.

1993) ("To say that the Justice Department administers section 2517 is to write out of existence the role of the court, which is statutorily mandated . . .). Simply put, "Title III does not grant the government . . . authority" to determine, on its own, whether to disclose, or refuse to disclose, wiretap evidence pursuant to § 2517. *Id.* at 1019-1020. It remains the duty and responsibility of the court, and not the prerogative of the government, to sanction – or to forbid – disclosure.

Ironically, the government recognized the court's authority in this regard at the outset of this case when it sought – and obtained – explicit permission from the district court to disclose a number of wiretap tapes. (*See* App. 74). Nonetheless, on appeal, faced with the government's objection to disclosure of the remainder of the wiretap evidence, the court of appeals abdicated judicial responsibility for deciding whether disclosure was appropriate and justified. Such abdication was clearly error.

Nor are there any grounds to judicially sustain the government's objection to disclosure of the wiretap evidence. First, contrary to the court of appeals' suggestion (*see* App. 25), no genuine "privacy concerns" have arisen in this case. Although 18 U.S.C. § 2518(10)(a) and § 2520(1) provide for aggrieved parties to complain about infringement of their privacy rights, no such complaints have been made here. Nor could the defendants in the *Ojomo* case, or others whose conversations may have been intercepted, reasonably bring such complaints, given the presumptive lawfulness of the wiretaps, including presumptive compliance with minimization requirements. *See* § 2518(10)(a). Moreover, it is not for the government to raise complaints on behalf of potentially aggrieved

third-parties; rather, such parties must bring any such complaints themselves. *Cf. In re Letters Rogatory from Tokyo District, Tokyo Japan*, 539 F.2d at 1219 (where the persons aggrieved by the district court's response to the letter rogatory request for discovery filed their own motions to quash the discovery procedures).

Second, no law enforcement interest justifies a refusal to make the disclosure sought here. Indeed, the government conceded at the hearing on October 21, 1999, that disclosure of the wiretap evidence would not "hurt" or "jeopardize" any pending government investigation and that, in any event, this evidence was previously disclosed to the defendants in the *Ojomo* case. (*See* App. 73-74). What, then, could be the harm in disclosing the wiretap evidence to the English defendants? The benign character of such a disclosure is underscored by the fact that the investigation leading to the English indictment has been inextricably intertwined with the investigation of the *Ojomo* case so that disclosure in the latter, which has already occurred, is tantamount to disclosure in the former.

Finally, contrary to the court of appeals' conclusion (*see* App. 24), the wiretap information in this case has, in fact, been "made public." Not only were the tapes and transcripts disclosed to the defendants in the *Ojomo* case in discovery prior to their guilty pleas (*see* App. 73), but more importantly, because these materials form a central basis of the government's prosecution of the *Ojomo* defendants, they must be deemed to be the very basis upon which the *Ojomo* guilty pleas were entered.

The court of appeals' conclusion thus conflicts with precedents of other courts of appeals which hold that when disclosure of wiretap information is made in connection with a guilty-plea proceeding that information *becomes part of the public record and, hence, disclosable. Griffin v. United States*, 588 F.2d 521, 523, 526 (5th Cir. 1979); and *Fleming v. United States*, 547 F.2d 872, 874 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977). As the legislative history of the wiretap statute explains, "[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited." Sen. Rep. No. 1097, *supra*, at 2181; *Fultz v. Gilliam*, 942 F.2d 396, 403 (6th Cir. 1991). Accordingly, "[e]vidence derived from communications lawfully intercepted as part of a *bona fide* criminal investigation that results in [a] . . . conviction may be properly [disclosed subsequently] . . . at least when the evidence is already part of the public record of the prior criminal prosecution." *Fleming*, 547 F.2d at 875; *see also, Spatafore v. United States*, 752 F.2d 415, 417 (9th Cir. 1985).

In sum, given the absence of any genuine "privacy concerns" or threat of harm to law enforcement interests, coupled with the prior public-record disclosure of the wiretap evidence at issue, the court of appeals' abdication of its responsibility to determine whether disclosure is justified is error that should not be ignored.

CONCLUSION

For all the foregoing reasons, Petitioner United Kingdom (Oladele Raji) respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.

UNITED KINGDOM, requesting the assistance of the United States Government in securing documentary evidence in the case of Regina V. Olumbummi Wood, et al., Frank Martin, Oladele Raji, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 00-11114.

Jan. 19, 2001.

Adam Gersch, Stephen Fidler, London, England, Wilfred Forster-Jones, c/o Knox Ukiwa & Co., London, United Kingdom, for Plaintiffs-Appellants.

Anne R. Schultz, Miami, FL, Sara Criscitelli, Office of Intern. Affairs, Dept. of Justice, Washington, DC, for Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before MARCUS, WILSON and MAGILL,* Circuit Judges.

MARCUS, Circuit Judge:

Appellants Oladele Raji and Frank Martins appeal the district court's order declining to compel the disclosure of certain sensitive law enforcement documents possessed by the United States, including grand jury materials, work product, and wiretap information, all of which Appellants contend are relevant to their defense of a criminal prosecution in England. The United States

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* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

agreed to produce certain records related to Appellants' prosecution, but refused to produce others. The district court found that the undisclosed documents are privileged or protected by statute, and that Appellants had failed to demonstrate a compelling need for them. Because the district court did not abuse its discretion in declining to order further disclosure of these documents, we affirm.

I.

The background to this appeal is relatively straightforward. Appellants are currently awaiting trial in England on criminal charges related to an alleged credit card fraud scheme.[1] The indictment in that case alleges that Appellants participated in a conspiracy whose members used, in the United Kingdom, American Express credit card numbers that they had obtained from American co-conspirators. The American co-conspirators were tried in a separate proceeding before a federal district court in the Southern District of Florida following an investigation by the United States government (the "*Ojomo* prosecution").[2]

In January 1999, Appellants and a third defendant in the English proceeding, Olumbummi Woods, applied to Judge Elwen of the Crown Court – the judge presiding

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[1] This Court has been advised that Appellants' trial is scheduled to begin in February 2001.

[2] According to the Government, that investigation is not complete, because two fugitives (one of whom is fighting extradition from the United Kingdom) have yet to be tried.

over the criminal trial – for the issuance of a letter rogatory seeking the disclosure of various materials related to the *Ojomo* prosecution. Judge Elwen granted the request, and accordingly issued two letters rogatory on behalf of the Appellants, dated February 8, 1999, and February 26, 1999, respectively. The letters asked the United States District Court for the Southern District of Florida to assist the three English criminal defendants by ordering agents of the United States government ("Government") and American Express to produce various materials gathered during and generated by the investigation giving rise to the *Ojomo* prosecution.

Appellants then moved in the Southern District of Florida for discovery and inspection of the materials identified in the letters rogatory. In response, the Government agreed to produce voluntarily some of the requested materials, including grand jury and wiretap information. On July 20, 1999, the district court memorialized these voluntary disclosures in an order which lifted secrecy protections applicable to the wiretap and grand jury materials and thereby permitted the Government to disclose them. In addition, the district court authorized Appellants to take the deposition of Joan Ojomo, in connection with which the Government gave the British Crown Prosecution Service ("CPS") access to additional materials from the *Ojomo* investigation.

Meanwhile, on or about August 23, 1999, the CPS, apparently pursuant to its discovery obligations under English law, served Appellants with a disclosure schedule prepared by the CPS and a British police constable after a visit to the offices of the U.S. Secret Service in

Miami.[3] That schedule inventoried several hundred files and boxes of unused investigative materials related to the *Ojomo* prosecution still in the possession of the United States. The listed materials are generally of three types: grand jury materials, work product (including written summaries and memoranda) of the local U.S. Attorney's Office and the Secret Service, and records of intercepted conversations obtained during the *Ojomo* investigation. It is these materials, not the items covered by the earlier requests, which are the subject of this appeal.

Upon receipt of the CPS schedule, Appellants asked the district court to permit additional discovery. In an order dated October 4, 1999, the district court explained that it stood "ready to respond to any request issued by its sister court in Britain," but would only consider granting relief if Judge Elwen first issued such a request after determining that "the interests of justice would be served by additional discovery in the United States."

Appellants then moved in the English court for additional discovery. Judge Elwen determined that the very fact that the items were listed on the CPS's disclosure schedule meant that these items satisfied the threshold test of "relevance or possible relevance" and therefore were discoverable under English law. Accordingly, on

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[3] It is unclear to what extent British law enforcement "stud[ied] in depth" these items (as Appellants claim) rather than examining them solely for the purpose of cataloguing them. This Court is not aware of any evidence that the Government disclosed the contents of these items to British law enforcement; indeed, the Government asserts that most if not all of these items have never been disclosed publicly.

October 8, 1999, Judge Elwen ruled that Appellants were entitled to discovery of the items. In so doing, however, Judge Elwen emphasized that this ruling was "subject to any claim as to privilege, immunity, or otherwise as may be asserted by those with possession of the documents and upheld by the appropriate American judicial authority" (emphasis added).

Citing this ruling and the February 1999 letters rogatory, Appellants, on October 19, 1999, filed a second motion with the district court, seeking an order compelling disclosure of the items. The district court referred the matter to a United States Magistrate Judge. The magistrate judge conducted a three-hour hearing on the matter, during which the magistrate judge and the parties considered in detail each of the several hundred items on the disclosure schedule. The Government agreed to disclose voluntarily certain of the requested materials, including wiretap applications, supporting affidavits, court orders authorizing wiretaps, and Secret Service interviews of persons arrested in the *Ojomo* prosecution. The Government did not, however, agree to produce all of the requested items. The Assistant United States Attorney responsible for the matter repeated an earlier representation that the Government's investigation and the requested materials did not relate to, mention, or incriminate the Appellants.

On October 29, 1999, the magistrate judge issued a Report and Recommendation. In her report the magistrate judge ordered American Express to disclose certain account information relating to the *Ojomo* investigation,

excluding work product and personal, customer, or proprietary information, and also recommended that the district court approve the Government's voluntary disclosures. Otherwise, however, the magistrate judge recommended against disclosure of the items on the disclosure schedule. She concluded that the grand jury and work product materials were privileged, implicitly finding as well that Appellants had not shown a sufficient basis to overcome the privilege. As for the records of intercepted conversations, she concluded that the federal wiretap statute, 18 U.S.C. § 2510, et seq., barred their disclosure, and that moreover Appellants had not shown a compelling need for them.

Appellants filed a timely objection to the Report and Recommendation. On November 18, 1999, the district court affirmed the report and adopted its recommendations. The district court issued an amended order to the same effect on December 3, 1999, after considering Appellants' objections a second time. This appeal followed.

II.

As an initial matter, it is essential to clarify the laws or treaties by which Appellants may assert their entitlement to the materials in dispute. Appellants identify three sources for their entitlement to these materials: 28 U.S.C. § 1782; the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. No. 104-2 ("MLAT"); and the Hague Convention on

the Taking of Evidence Abroad in Civil and Commercial Matters. The United States agrees that § 1782 provides authority for the potential disclosure of the materials.[4] It disputes, however, that the MLAT and the Hague Convention are implicated by this case. We agree.

The MLAT in relevant part authorizes United States courts to give effect to certain requests made by the United Kingdom for information relevant to criminal investigations or prosecutions. *See* MLAT, art. 5, ¶ 1. The MLAT with the United Kingdom is one of a series of modern mutual legal assistance treaties negotiated by the United States in order to counter criminal activities more effectively. The MLAT provides for a broad range of cooperation in criminal matters, including (1) the taking of testimony or statements of witnesses; (2) the provision of documents, records, and evidence; (3) the service of legal documents; (4) the location or identification of persons; (5) the execution of requests for searches and seizures; and (6) the provision of assistance in proceedings relating to the forfeiture of the proceeds of crime and the collection of fines imposed as a sentence in a criminal prosecution. *See* Letter of Transmittal from the President of the United States to the Senate, Jan. 23, 1995. The MLAT is a self-executing treaty, and was in effect at the time this proceeding commenced.

A key feature of the MLAT is the requirement that a request for assistance be made, not directly to the courts, but rather between the "Central Authorities," which the treaty defines as the Secretary of State of the Home

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[4] Section 1782 is discussed below.

Department (for the United Kingdom), and the Attorney General (for the United States), or their designees. MLAT, art. 2, ¶ 2. There is no provision for private parties, such as individual criminal defendants in the English (or American) courts, to request the production of information. *See* MLAT, art. 1, ¶ 3 ("The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence. . . . "). Moreover, the request itself must comply with various requirements. Specifically, it must include (a) the name of the authority conducting the proceedings to which the request relates; (b) the subject matter and nature of the proceedings for the purposes of which the request is made; (c) a summary of the information giving rise to the request; (d) a description of the evidence or information or other assistance sought; and (e) the purpose for which the evidence or information or other assistance is sought. *Id.*, art. 4, ¶ 2; *see* also art. 4, ¶ 3 (listing additional items to be included "[t]o the extent necessary and possible").

We need not consider Appellants' arguments under the MLAT, because no valid MLAT request was ever made for the specific materials at issue in this appeal.[5]

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[5] We note, however, that compliance with an MLAT request is not mandatory with respect to records held by governmental agencies. *See* MLAT, art. 9, ¶ 2 ("The Requested Party may provide a copy of any record or information in the possession of a government department or agency but not publicly available to the same extent and on the same conditions as to its own law enforcement or judicial authorities. The Requested Party may refuse a request pursuant to this paragraph entirely or in part."). Thus, even if the October letter were a valid MLAT

Appellants refer to a document sent by the CPS to the district court on or about October 21, 1999, entitled "Response by Crown Prosecution Service to the Defense Application for Disclosure of Unused Material in the United States of America," and suggest that it constituted a MLAT request. That document, however, did not conform to the requirements of the MLAT, and thus cannot be viewed as a proper MLAT request. The document was not transmitted between Central Authorities or their designees, but rather was sent by the CPS directly to the district court. Appellants suggest that the October letter should be viewed as a supplement to the prior requests, which they contend were transmitted in conformity with the MLAT. But there is simply no dispute that the original communications did not discuss, let alone request, the specific material referenced by the October letter; the material underlying the October letter was far more expansive and entirely different in scope. The letter cannot be viewed as a valid MLAT request solely because a proper MLAT request had been made earlier for other records relating generally to the same subject matter.[6]

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request, it would not automatically follow that Appellants are entitled to the documents they seek in this appeal.

[6] Moreover, the document did not specifically request any disclosure; although it stated the CPS's "hope[ ] that all unused material in the United States relevant to the defense is disclosed to them," the CPS's position was ultimately "one of neutrality" regarding production of the items in question. Appellants do not dispute this fact, but insist that Government counsel described the letter as a "request" during the hearing before the magistrate judge, and that the magistrate in turn accepted this description. The Government counters that it never described the letter as a proper MLAT request.

Appellants' alternative suggestion that the Hague Convention provides a source for the disclosure of this information fares no better. The Convention permits signatory nations (such as the United States and the United Kingdom) to respond to a request from another signatory for evidence related to civil and commercial matters. *See* 28 U.S.C. § 1781 note; *see* also *id.*, art. 1 ("In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act."). The Convention plainly does not apply to this proceeding. The materials at issue here are sought for use in a criminal proceeding; the Convention, by contrast, by its terms applies only to civil and commercial matters. *See In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 593 (4th Cir.1996) ("[T]he Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, as its title verifies, applies only to civil and commercial cases[.]").

Appellants contend that because this request involves "discovery" it should be deemed a civil matter. But that argument, in addition to being wholly unsupported, would contradict the plain meaning of the text of the Convention by making the Convention potentially applicable in all disputes, not merely civil or commercial cases. Appellants also contend that because the underlying criminal case involves commercial transactions, the Convention should be triggered. But that argument suffers from the very same defects: it is unsupported, and would rewrite the text of the Convention. In any event,

even if we were to hold that the Convention could be applied in connection with a criminal proceeding, the CPS's October letter plainly did not comply with the Convention's requirements for a letter of request. *See* U.S.C. § 1781 note, art. 3.[7]

In short, it is § 1782, and § 1782 alone, that provides a potential basis for disclosing to Appellants the information now at issue.

III.

Under 28 U.S.C. § 1782, district courts have the power to provide assistance to foreign courts by responding to letters rogatory and other requests from interested parties such as Appellants here. The statute provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a

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[7] Among other requirements, the Convention specifies that a letter of request must contain "(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority; (b) the names and addresses of the parties to the proceedings and their representatives, if any; (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto; (d) the evidence to be obtained or other judicial act to be performed." 28 U.S.C. § 1781 note, art. 3.

> foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782(a). The last sentence of the statute contains an important caveat, by explaining that "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." *Id.*

Whether, and to what extent, to honor a request for assistance pursuant to § 1782 has been committed by Congress to the sound discretion of the district court. *See*, e.g., *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1565-66 (11th Cir.1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1154 (11th Cir.1988); S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), reprinted at 1964 U.S.C.C.A.N. 3782, 3788 (explaining that section 1782 "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable"). Two important points flow from this fact. First, a district court's compliance with a § 1782 request is not mandatory; contrary to Appellants'

repeated suggestions, the district court was not obliged to grant their application simply by virtue of the English court's order or for any other reason. Second, our review of the district court's decision in this case is extremely limited and highly deferential. Because "Congress has given the district courts such broad discretion in granting judicial assistance to foreign countries, this court may overturn the district court's decision only for abuse of discretion." *Lo Ka Chun*, 858 F.2d at 1565-66; accord, *Trinidad and Tobago*, 848 F.2d at 1154.[8] This deferential standard is identical to that used in reviewing the district court's ordinary discovery rulings, such as rulings as to whether the foundation for a claim of privilege has been established. *See Harris v. Chapman*, 97 F.3d 499, 506 (11th Cir.1996) ("District judges are accorded wide discretion in ruling upon discovery motions, and appellate review is accordingly deferential."); *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1413 (11th Cir.1994) ("Discovery orders should not be overturned 'unless the district court has abused its discretion and such abuse has resulted in substantial harm to the party seeking relief.' ") (citation omitted); *see* also *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 n. 6 (2d Cir.1995) (stressing that "if the district court determines that a party's discovery application under section 1782 is made in bad faith, for the purpose of harassment, or unreasonably

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[8] Of course, to the extent the district court's decision is based on an interpretation of law, our review is de novo. *See*, e.g., *SunAmerica Corp. v. Sun Life Assur. Co.*, 77 F.3d 1325, 1333 (11th Cir.1996) (holding that the district court necessarily abuses its discretion if it "has applied an incorrect legal standard").

seeks cumulative or irrelevant materials, the court is free to deny the application in toto, just as it can if discovery was sought in bad faith in domestic litigation").

Appellants contend that the district court abused its discretion in declining to order production of items that the Government refused to produce voluntarily. Appellants challenge particular aspects of the district court's reasoning with respect to the grand jury, work product, and wiretap materials in question. More broadly, they contend that the magistrate judge (whose report was adopted by the district court) ignored Judge Elwen's finding regarding the relevance of these materials to the defense of the English prosecution.

Turning first to the broadest objection, we find no reversible error in the magistrate's approach to the issue of relevance. In deciding whether to respond to a request under § 1782, "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance." *Trinidad and Tobago*, 848 F.2d at 1156; *see* also *Euromepa*, 51 F.3d at 1100 (noting that "inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782"). Here, the English court determined that, as a matter of English law, the items listed on the CPS's disclosure schedule were relevant or possibly relevant to Appellants' defense and thus were discoverable. The magistrate judge demonstrated proper respect for that finding, and did not expressly reject Appellants' request because they failed to show relevance.

The magistrate judge did, at certain junctures in her opinion, question the sufficiency of Appellants' showing of a powerful need for some of these materials; she did so, however, not in the context of discussing relevance, but rather in the analytically distinct context of determining whether the Government's claims of privilege and statutory immunity should be sustained. Moreover, although the relevance of a piece of evidence to the subject matter of the case is obviously a consideration in evaluating a party's need for that evidence, it is by no means the only consideration. It is often the case that a piece of evidence may be relevant (as that concept is defined under applicable law) without being so vital or unique that powerful competing interests such as those embodied in a privilege must give way. Indeed, Judge Elwen expressly recognized this fact by qualifying the ruling as to discoverability and making it "subject to any claim as to privilege, immunity, or otherwise as may be asserted by those with possession of the documents and upheld by the appropriate American judicial authority." As this language underscores, Judge Elwen made no attempt to rule that the Appellants had demonstrated sufficient particularized need for the materials to overcome a claim of privilege or statutory immunity; indeed, Judge Elwen made no express finding at all regarding Appellants' relative need for these materials, and simply held that Appellants met the threshold test for discoverability under English law subject to any satisfactory claims of privilege.

Accordingly, the district judge did not err by failing to equate Judge Elwen's finding of "relevance or possible relevance" with a finding that the Appellants' need for

these materials is powerful enough to overcome the privileges and immunities that otherwise attach to these items.[9]

We turn, then, to the particular claims of privilege upheld by the magistrate judge. We see no reversible error in the district court's implicit finding that Appellants failed to establish the particularized need required for disclosure of secret grand jury materials. With limited exceptions not applicable here, the disclosure of grand jury materials must first be authorized by the court. *See* Fed.R.Crim.P. 6(e)(2),(3). In light of the benefits of maintaining the secrecy of grand jury proceedings, "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, . . . the burden of demonstrating this balance rests upon the private party seeking disclosure." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). The Supreme Court has repeatedly stressed the

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[9] Appellants suggest that by her approach, and particularly her stated intent to "enforce" Judge Elwen's order, the magistrate judge denied them a sufficient opportunity to establish their need for the materials. Having reviewed the record, including the transcript of the hearing before the magistrate judge, we reject Appellants' contention. This argument is little more than a variation on Appellants' unpersuasive claim that Judge Elwen's order had already decided Appellants' substantial, particularized need for the materials. In any event, Appellants had ample opportunity during the hearing before the magistrate judge, and thereafter, to take into account case law discussing the need requirement and make whatever presentation or motion (such as an application for in camera review) that they felt might be helpful in overcoming the Government's objections.

wide discretion given district courts in evaluating whether disclosure of grand jury materials would be appropriate. *See*, e.g., *United States v. John Doe, Inc. I*, 481 U.S. 102, 116, 107 S.Ct. 1656, 95 L.Ed.2d 94 (1987).

Under this Court's precedent, in order to obtain disclosure of protected grand jury materials, a person must show a "particularized need" for them. *United States v. Cole*, 755 F.2d 748, 758-59 (11th Cir.1985) (citing *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir.1976)). Parties seeking grand jury materials "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material so needed." *Douglas Oil*, 441 U.S. at 222, 99 S.Ct. 1667; *see* also *id.* at 221, 99 S.Ct. 1667 (holding that the requesting party must demonstrate that without the requested materials "a defense would be greatly prejudiced or . . . an injustice would be done").

Appellants contend that the magistrate judge should have ordered disclosure of the grand jury materials over the Government's objection. They do so in part based on the mistaken premise, discussed above, that the English court's finding of "relevance or possible relevance" under English law suffices as a determination of particularized need under American law regulating the disclosure of grand jury material. They also assert that there is sufficient evidence in the record to demonstrate the exculpatory nature of the materials sought and thereby to show a particularized need for those materials. But Appellants' blanket request for all of the unused grand jury materials from the *Ojomo* prosecution cannot be described as the

kind of particularized request required for the production of otherwise secret information. Moreover, the breadth of Appellants' request, while understandable to some extent given their lack of access to the materials, makes it virtually impossible for them to demonstrate that each of hundreds of sought-after grand jury items is likely to be exculpatory in the ways they suggest, especially given the representation by the Government's attorney on the record that these items do not mention, let alone exculpate, the Appellants.[10]

Finally, Appellants' arguments as to need are presented at the very highest order of abstraction; the fact that these items are being sought by defendants in a criminal case for use in defending the charges brought against them is insufficient standing alone. *See Cole*, 755 F.2d at 758-59; *see* also *United States v. Rockwell Int'l Corp.*, 173 F.3d 757, 760 (10th Cir.1999) (discussing particularized need requirement and stressing that "[n]o grand jury testimony is to be released for the purpose of a fishing expedition or to satisfy an unsupported hope of revelation of useful information"). The district court did

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[10] For example, Appellant Raji asserts that disclosure of these items is vitally necessary so that he may prove that he was not involved in the alleged fraud; as he sees it, the absence of any reference to him in the materials helps him establish his lack of connection to the fraud. But we fail to see how this theory establishes a sufficiently compelling need for the production of literally hundreds of sensitive items, particularly when the Government has apparently volunteered to provide sworn affidavits confirming that Appellants are not mentioned at all in the materials.

not abuse its broad discretion in declining to grant Appellants' request for secret grand jury material.

Similarly, the district court did not abuse its discretion by declining to order the production of the Government's confidential work product. The work-product doctrine reflects the strong "public policy underlying the orderly prosecution and defense of legal claims." *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The privilege applies in criminal matters as it does in civil cases. *See*, e.g., *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) ("Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."). Specifically, Rule 16(a)(2) of the Federal Rules of Criminal Procedure does not permit "the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case." Fed.R.Crim.P. 16(a)(2).

Although we have never addressed the precise contours of Rule 16(a)(2), courts have generally explained in civil matters that to overcome the work product privilege a person must show both a substantial need for the information and that seeking the information through other means would cause undue hardship. *See*, e.g., Fed.R.Civ.P. 26(b)(3); *Hickman*, 329 U.S. at 512-13, 67 S.Ct. 385 (party must show that production of the material is

not merely relevant, but also necessary). Even that showing does not suffice when considering so-called "opinion" work product, such as internal memoranda, that reflects an attorney's mental impressions; these materials are almost always protected from disclosure. *See*, e.g., *Hickman*, 329 U.S. at 510, 67 S.Ct. 385; *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir.2000) (noting in dispute under Fed.R.Crim.P. 16(a)(2) that "opinion work product enjoys almost absolute immunity" from discovery). We observe that some courts appear to have read Fed.R.Civ.P. 16(a)(2) as providing that same kind of unwavering protection to all work product in criminal matters. *See United States v. Fernandez*, 231 F.3d 1240, 1247-48 (9th Cir.2000); *United States v. Mann*, 61 F.3d 326, 331 (5th Cir.1995).[11]

We need not define today the additional limitations, if any, imposed by Rule 16(a)(2) on the discoverability of work product for use in criminal matters, because even using the common-law standard of *Hickman* for non-opinion work product in a civil case, Appellants have not

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[11] Even items that are material and exculpatory to a defendant, and therefore potentially within the ambit of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), are not necessarily outside the protections of Rule 16(a)(2). *See Mincey v. Head*, 206 F.3d 1106, 1133 n. 63 (11th Cir.2000) (noting that neither the Supreme Court nor this Court has held that *Brady* requires disclosure of a prosecutor's work product). Rule 16(a)(2), unlike its civil counterpart (Fed.R.Civ.P. 26(b)(3)), does not contain any express exception or state any circumstances under which work product may be discovered, although the Rule does not necessarily preclude the possibility that other laws may nevertheless require production of work product. *See United States v. Armstrong*, 517 U.S. 456, 474, 116 S.Ct. 1480, 134 L.Ed.2d 687 (Breyer, J., concurring).

shown reversible error. Having reviewed the record in detail, we conclude that the magistrate judge did not abuse her discretion by sustaining the Government's claims of work product. Although Appellants assert that the magistrate judge accorded work product status to documents that did not constitute work product, they fail to identify the specific items that they believe should not have been regarded as work product. Our own review of the hearing transcript and the descriptions printed on the CPS's disclosure schedule confirm that most if not all of the items identified by the magistrate judge as work product fall acceptably within that definition (indeed, at least some of these items appear to be opinion work product). Moreover, for the reasons stated above, Appellants have not shown a substantial need for production of these materials at this time. Although Appellants cite frequently to Judge Elwen's finding of "relevance or possible relevance," that finding alone does not overcome a valid claim of work product privilege. On this record, we find no abuse of discretion in the district court's conclusion.

We reject as well Appellants' argument that the magistrate judge erred in rejecting their request for records of intercepted conversations. Title III of the Federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, et seq., regulates the collection and disclosure of wiretap evidence. The statute requires that the contents of intercepted conversations be sealed. *See* 18 U.S.C. § 2518(8)(a). Those contents may be disclosed only in a limited number of instances. *See id.* § 2517. The statute also makes it an offense to disclose material covered by the statute in the absence of statutory authorization. *Id.*

§ 2511(1). Courts interpreting these provisions have held that the statute generally bars the disclosure of the contents of conversations intercepted through a wiretap absent a specific statutory authorization. *See*, e.g., *Nix v. O'Malley*, 160 F.3d 343, 351 (6th Cir.1998) (noting that the federal wiretap statute permits disclosure in limited instances but that its plain language allows no additional exceptions); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015, 1018 (8th Cir.1993) (en banc) ("When addressing disclosure of the contents of a wiretap, the question is whether Title III specifically authorizes such disclosure, not whether Title III specifically prohibits disclosure, for Title III prohibits all disclosures not authorized therein."); *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir.1982) ("[B]y permitting disclosure of lawfully obtained wiretap evidence only under the specific circumstances listed in 18 U.S.C. § 2517, Title III implies that what is not permitted is forbidden[.]").

The magistrate judge properly concluded that the involuntary disclosures of wiretap material sought here are not permitted by the statute. Appellants maintain that the wiretap material should be ordered produced pursuant to the exception contained in § 2517(1), which provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the

> official duties of the officer making or receiving the disclosure.

18 U.S.C. § 2517(1). Appellants emphasize that the material in question has been sought by British law enforcement officials (the CPS, in its October 1999 letter). Appellants also emphasize that the agents of the United States from whom the materials are sought will be called as witnesses during the English prosecution, at which point they will be called upon to testify regarding the disputed materials, making eventual disclosure inevitable.

These arguments are unhelpful. No language in the federal wiretap statute suggests that foreign law enforcement officers are covered by § 2517(1). Nor are we aware of any indication in the statute or elsewhere that Congress intended this narrow exception to apply to foreign law enforcement officers. On the contrary, the statute defines "[i]nvestigative or law enforcement officer" as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7) (emphasis added). Section 2517(1), therefore, does not authorize the involuntary disclosure sought here. Nor does § 2517(2), also cited by Appellants, permit the Court to order this disclosure over the objection of the Government. *See* 18 U.S.C. § 2517(2) ("Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom

may use such contents to the extent such use is appropriate to the proper performance of his official duties." (emphasis added)).

Moreover, even if we were to assume that the wiretap statute leaves a federal court the discretion to order in limited circumstances the release of wiretap information over the objection of the Government and in the absence of a clear statutory authorization (a proposition squarely at odds with the case law), the district court did not abuse its discretion by finding that Appellants failed to demonstrate a sufficient need for this information. We observe as well that none of the particular information at issue has been made public, and that speculation by the Appellants that some of this protected information may eventually be revealed voluntarily by agents of the United States during the English court proceedings cannot justify present involuntary disclosure in violation of American law.

Finally, Appellants' argument that the Government is required to produce the requested items under the doctrine of "judicial estoppel" is without merit. Appellants contend that, by previously volunteering to disclose certain materials, the Government is estopped from claiming now that related but undisclosed documents are protected from disclosure by either a privilege or a lack of statutory authorization. " 'Judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.' " *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir.1991) (quoting *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir.1983)). There has

been no such change of positions here. The fact that the Government agreed to disclose certain information in response to limited initial requests, but then declined to do so again when the scope of the requests expanded to include a substantial amount of additional, different information, does not gives rise to judicial estoppel. Moreover, at all times, the Government took the position that court approval would be required before any disclosure of grand jury or wiretap information could be made. We see no basis for applying judicial estoppel in this case; indeed, a contrary holding might effectively discourage the Government from attempting to narrow potential document production disputes voluntarily when confronted with future requests for assistance from courts or persons abroad.

To summarize, the scope of our review in this appeal is limited and deferential. The district court gave the required respect to the English court's order and the important considerations of comity underlying § 1782, but recognized that competing domestic law enforcement and privacy concerns articulated by the Government justified withholding some (but not all) of the items in question. On this record, we are unconvinced that the district court abused its broad discretion in declining to order further disclosure. *See Davenport Recycling Assocs. v. Commissioner of Internal Revenue*, 220 F.3d 1255, 1258 (11th Cir.2000) ("We will reverse for abuse of discretion only if we have a definite and firm conviction that the [c]ourt committed a clear error of judgment in the conclusion it

reached.") (citation omitted). We therefore must affirm the district court's order.[12]

AFFIRMED.

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[12] During proceedings below the Government "preserved" but did not press its argument that this proceeding is barred by the doctrine of sovereign immunity. The Government took a similar approach at oral argument. The applicability of sovereign immunity principles to proceedings under § 1782 is a substantial and largely unexplored question that has not been sufficiently briefed by the parties. We therefore follow the Government's lead and do not resolve that issue today, because we conclude that the Government plainly is entitled to prevail on narrower grounds. *See* also *Al Fayed v. United States*, 210 F.3d 421, 425 (4th Cir.2000) (declining to reach the question of whether the Government constituted a "person" under § 1782 after finding that the district court did not abuse its discretion in denying the disclosure of material that could impact national security).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-1562-CIV-HURLEY

In re:
FEBRUARY 8, 1999 LETTER ROGATORY FROM THE CROWN COURT AT SNARESBROOK

_____/

AMENDED ORDER ADOPTING REPORT AND RECOMMENDATION

(Filed Dec. 3, 1999)

THIS CAUSE is before the court upon the Report and recommendation rendered by United States Magistrate Judge Vitunac, defendant Frank Martins' and defendant Oladele Raji's objections thereto, and the United States' and American Express' respective responses in opposition. Pursuant to Fed. R. Civ. P. 72(b), "The district judge . . . shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." The rule requires that objections be filed within ten days of service of the report and recommendation, and that the objecting party arrange for transcription of sufficient portions of the record. Fed. R. Civ. P. 72(b). The district judge may then "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." *Id.* Portions of the report and recommendation that are not specifically objected to are subject to the clear error standard. The identical requirements are set forth in 28 U.S.C. § 636(b)(1).

On October 29, 1999, Magistrate Judge Vitunac issued a report and recommendation ("R&R") in this matter recommending that certain documents (defined in the R&R) be disclosed to the defendants by the United States and American Express. Objections to the R&R were due by November 15, 1999. Upon consideration of the timely filed objections, the court adopted the R&R in its entirety. *See* DE #35. Following the adoption of the R&R, the defendants complained to the undersigned by letter that some or all of their objections to the R&R had not been properly considered. Due to defendants' concerns that their objections had not been fully considered and in an abundance of caution, the undersigned reconsidered the R&R and all documents filed thereafter, including those filed after the court's initial order adopting the R&R.

Upon *de novo* review of the R&R and those portions specifically objected to, as well as review of the relevant pleadings, it is hereby

ORDERED and **ADJUDGED**:

1) The Report and Recommendation of United States Magistrate Judge Vitunac [DE #26] is **ADOPTED** in its entirely and incorporated herein by reference.

2) Disclosure of documents shall occur in a manner consistent with the report and recommendation.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 3rd, day of December, 1999.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO.: ~~99-1526~~ [99-1562]
CIV-HURLEY/VITUNAC

IN RE:
FEBRUARY 8, 1999 LETTER
ROGATORY FROM THE CROWN
COURT AT SNAREBROOK,
_____/

ORDER AFFIRMING REPORT AND RECOMMENDATION

(Filed Nov. 18, 1999)

THIS CAUSE came before the Court upon the Report and Recommendation issued by Magistrate Judge Ann E. Vitunac on October 29, 1999, recommending disclosures to British counsel be made consistent with her Report and Recommendation with respect to the same.

THE COURT has considered the Report and Recommendation and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the United States Magistrate Judge's Report and Recommendation be, and the same is hereby, RATIFIED, AFFIRMED and APPROVED in its entirety.

DONE AND ORDERED in Chambers this 1st day of ~~October~~ [Nov.], 1999, at West Palm Beach in the Northern Division of the Southern District of Florida.

/s/ Daniel T. K. Hurley
DANIEL T. K. HURLEY
United States District Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO.: ~~99-1526~~ [99-1562] CIV-HURLEY/VITUNAC

IN RE:
FEBRUARY 8, 1999 LETTER
ROGATORY FROM THE
CROWN COURT AT
SNAREBROOK,
_____/

REPORT AND RECOMMENDATION

(Filed Oct. 29, 1999)

THIS CAUSE is before the court on oral order of reference from United States District Court Judge Daniel T.K. Hurley for the filing of a report and recommendation with respect to "disclosure and inspection sought from the American authorities contained in the Disclosure Schedule and numbered items #398 to #698, subject to any claim as to privilege, immunity or otherwise as may be asserted by those with possession of the documents and upheld by the appropriate judicial authority." This disclosure is in the matter of *Regina v. Frank Martins and Oladele, Hammed Raji,* Case No.: T980950 in the Southwark Crown Court.

On Thursday, October 21, 1999, this court conducted a three hour hearing with respect to the discovery issues addressed by the order of Judge Elwen. The parties were given until Tuesday, October 26, 1999, to file their respect memoranda of law with respect to the issue of whether or not wire tap evidence could properly be disclosed to

defense counsel in the United Kingdom. The parties were also given until Tuesday to prepare for this court a joint order setting forth the decisions and understandings reached at the evidentiary hearing of October 21, 1999. As of this date, this court has received and reviewed the memoranda from counsel and has received a unilateral filing of a draft order from the U.S. Government, which reflects on the face sheet of the facsimile copy that Mr. Fidler was not happy with the format of the order provided by the government and that he would be sending his own. As of this date, October 29, 1999, this court has received no proposed order from Mr. Fidler nor from Mr. Jones nor has this court received any further motions or submissions from them. This matter is now ripe for review.

After exhaustive discussion with counsel and parties in interest for both sides, this court RECOMMENDS that the district court order that American Express Company provide British defense counsel:

1. A list of accounts accessed by JOAN OJOMO in the United States case reflecting account screens opened by OJOMO on the account, including ATM transactions and locations in the United Kingdom.

2. AMEX computer documents showing losses on the credit cards in relation to each AMEX employee OJOMO and EGBARIN.

3. AMEX charge locations and ATM activity on each account.

4. Affidavits of loss by AMEX card customers.

None of the AMEX productions needs include work product, personal customer information nor AMEX proprietary information.

Further, this court RECOMMENDS to the district court that it order the British defendants RAJI and MARTINS to pay the cost of copying to AMEX in advance of any such productions, sought by RAJI and MARTINS.

At the hearing on disclosure before this court, the United States of America voluntarily agreed to provide wire tap applications, affidavits and court orders for the telephones of JOAN OJOMO and SEBASTIAN BAZIL previously presented to and/or ordered by United States District Court Judge Norman C. Roettger in 1996. Additionally, the United States Government agrees to provide United States Secret Service interviews of the arrested persons to the British defendants. Thus, this court RECOMMENDS that the district court ratify and/or order the disclosure of that information to the British defendants.

This court RECOMMENDS that grand jury material and work product of the United States Secret Service and the United States Attorney not be turned over to British counsel because under United States law that information is privileged. The specific materials not to be disclosed were detailed at the hearing before this court.

The British defense team seeks disclosure of the intercepted conversations from the Roettger wire tap orders seized during the investigation of "the American case." At the October 21, 1999 hearing, the government stated for the record that neither defendant RAJI nor defendant MARTINS was intercepted in any conversation on any wire in the American case. Additionally, Jeffrey

Kay proffered to the court that neither RAJI nor MARTINS was a named target of any intercept in that investigation. A person by the name of Victoria Martins was intercepted on the wire and she is believed to be the wife of Frank Martins. She is not a defendant in the British case.

Authority for the release of tapes under Title III must be found in 18 U.S.C. § 2517.

18 U.S.C. 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that

> communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
>
> * * *
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Title III prohibits disclosures not in accordance with the statute and provides civil penalties for those who would disclose in violation of the statute. In one of the few cases to decide a disclosure issue to third parties of wire intercepted conversation, the Eighth Circuit has held that "when addressing disclosure of the contents of a wire tap, the question is whether Title III specifically authorizes such disclosure, not whether Title III specifically prohibits the disclosure, for Title III prohibits all disclosures not authorized therein." *In re Motion to Unseal*

Electronic Surveillance Evidence, Howard J. Smith, Appellant vs. Don Lipton, Appellee, 990 F.2d 1015 (8th Cir. 1992). In the case at bar, neither British defendant was intercepted on the American wires. Neither British defendant was a target of those wires. The vast majority of the intercepted conversations in the American case were never publicly disclosed except to defense counsel in the American case. British defense counsel have not specified any particularized need for discovery of the thousands of tapes memorializing conversations to which their clients were not a party. British defense counsel argue that the failure to turn over such materials will unfairly prejudice their clients in the British trial. This position is not well founded. United States law requires the government to turn over to a defendant in a United States prosecution, any evidence it has which is material and exculpatory. See, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. This court has ordered and authorized the United States Government to turn over to British counsel any discovery which would be mandated in a United States prosecution if the defendant were charged in the United States. Thus, if the wire tap conversations contained *"Brady"* material as to defendant RAJI and MARTINS, the same would be discoverable. The fact that the government has not turned over such information is evidence that no such information exists. Jeffrey Kay, on behalf of the United States Government has affirmatively made that representation.

Other than the 15 tapes which the government is turning over to the Crown Prosecution for eventual discovery to British defense counsel, this court RECOMMENDS that no other wire tap disclosures be made. Even

if Title III allowed such disclosures in a foreign prosecution to defense counsel, which does not appear to be the case, these defendants have shown absolutely no need for the disclosures nor entitlement under United States law.

DONE and SUBMITTED this 29 day of October, 1999, at West Palm Beach in the Northern Division of the Southern District of Florida.

/s/ Ann E. Vitunac
ANN E. VITUNAC
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11114-JJ

UNITED KINGDOM, requesting the assistance of the United States Government in securing documentary evidence in the case of Regina v. Olumbummi Wood et al., FRANK MARTIN, OLADELE RAJI,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Apr. 16, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: MARCUS, WILSON and MAGILL*, Circuit Judges.

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* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

18 U.S.C. § 2510. Definitions

As used in this chapter –

* * *

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

* * *

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18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

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18 U.S.C. § 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

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18 U.S.C. § 2518. Procedure for interception of wire, oral, or electronic communications

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

* * *

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18 U.S.C. § 2520. Recovery of civil damages authorized

(a) In general. – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

* * *

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28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to improve the effectiveness of the law enforcement authorities of both countries in the investigation, prosecution, and combatting of crime through cooperation and mutual legal assistance in criminal matters,

Reaffirming their determination to enhance assistance in the fight against crime as set out in the Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, done at London February 9, 1988,

Have agreed as follows:

ARTICLE I

Scope of Assistance

1. The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the purpose of proceedings as defined in Article 19 of this Treaty.

2. Assistance shall include:

(a) Taking the testimony or statements of persons;

(b) providing documents, records, and evidence;

(c) serving documents;

(d) locating or identifying persons;

(e) transferring persons in custody for testimony (or other purposes);

(f) executing requests for searches and seizures;

(g) identifying, tracing, freezing, seizing, and forfeiting the proceeds and instrumentalities of crime and assistance in related proceedings; and

(h) such other assistance as may be agreed between Central Authorities.

3. This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

ARTICLE 2

Central Authorities

1. Central Authorities shall be established by both Parties.

2. For the United States of America, the Central Authority shall be the Attorney General or a person or agency designated by him. For the United Kingdom, the Central Authority shall be the Secretary of State for the Home Department or a person or agency designated by him.

3. Requests under this Treaty shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested party.

4. The Central Authorities shall communicate directly with one another for the purposes of this Treaty.

* * *

ARTICLE 19

Definitions

1. For the purposes of this Treaty, "proceedings" means proceedings related to criminal matters and includes any measure or step taken in connection with the investigation or prosecution of criminal offences, including the freezing, seizure or forfeiture of the proceeds and instrumentalities of crime, and the imposition of fines related to a criminal prosecution.

2. In addition, the Central Authorities may at their discretion treat as proceedings for the purpose of this Treaty such hearings before or investigations by any court, administrative agency or administrative tribunal with respect to the imposition of civil or administrative sanctions as may be agreed in writing between the Parties.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO: 99-1562-CIV-HURLEY

IN THE MATTER OF:

REGINA -v- FRANK MARTINS AND OLADLE RAJI

(England Case No: T980950)

RESPONSE BY CROWN PROSECUTION SERVICE TO THE DEFENCE APPLICATION FOR DISCLOSURE OF UNUSED MATERIAL IN THE UNITED STATES OF AMERICA

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1. The Crown Prosecution Service ("CPS") is the prosecuting authority in the case of R -v- MARTINS & RAJI (Case No T980950) due to be heard at Southward Crown Court on 12 November 1999 before HHJ Elwen.

2 The CPS has been advised that solicitors acting for Frank MARTINS and Oladele RAJI intend to apply for an order from HHJ Hurley that the United States Secret Service provide the said solicitors with access to all the material generated in the course of their investigation and prosecution of Joan Ojomo & Others (Case No 99-1562-CIV-HURLEY). The defence solicitors rely on an order dated 8 October 1999 of HHJ Elwen and a schedule of unused material, listing items numbered 398 - 638 inclusive, prepared by Detective Constable Patrick Burke of the Metropolitan Police Service.

3. Under English law applicable to this case, the prosecution (which is the CPS together with the Metropolitan Police Service) has a duty to disclose to the

defence all material which has come into the possession or control of the prosecution which is not served on the defence as part of the prosecution case, and which can be seen on a sensible appraisal by the prosecution:

(1) To be relevant or possibly relevant to an issue in the case;

(2) To raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use;

(3) To hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).

4. The mechanism by which the defence is notified of this material is as follows:

(1) The Police prepare and submit to the CPS a schedule listing the unused material in the case;

(2) The CPS makes a preliminary determination of materiality in accordance with the appraisal outlined in paragraph 3 above;

(3) The CPS reviewing lawyer endorses the schedule, indicating the items to be disclosed in the column headed D;

(4) The schedule is disclosed to the defence, who may then seek access to the disclosable items.

5. In this case the schedule of unused material for disclosure listing Items 1 - 397 inclusive was prepared by Detective Sergeant Richard Money of the Metropolitan Police Service.

6. The CPS reviewed the schedule and endorsed the schedule for the disclosure of those items which were in the possession of the prosecution. The endorsed schedule was copied to the defence.

7. It was apparent from the commencement of these proceedings in England that a large body of material relating to the source of the fraud was in the possession of the United States law enforcement authorities.

8. Before July 1999 the defence made their own enquiries as regards the extent and nature of that unused material via a letter of request issued by HHJ Elwen at Southwark Crown Court. In the opinion of the CPS the British police and the United States law enforcement agencies were conducting parallel investigations into fraudulent activity in their respective countries, involving different defendants (albeit the fraudulent activity was fuelled by information from a common source at American Express). Accordingly the relevant United States law enforcement agencies were considered a third party to the proceedings in England.

9. A hearing took place on 16 July 1999 before HHJ Hurley at West Palm Beach. As a result of that hearing some items were disclosed to the defence via HHJ Elwen of Southwark Crown Court.

10. It was apparent at the hearing in the United States and the defence did not know in detail what material was in the possession of the United States Authorities. In order to assist the defence, the CPS disclosed a list of unused material in the possession of the United States Secret Service which been prepared by Detective Constable Patrick Burke with their assistance.

The purpose of this exercise was to assist the defence in identifying what was available in the United States so that the defence could identify exactly what they wanted to see and explain the reasons. The material was not in the possession of the prosecution and was outside the control of the prosecution. There was no CPS endorsement of the schedule.

11. In the event, HHJ Elwen took the view on 8 October 1999 that all the unused material listed was disclosable. HHJ Elwen did not ask the defence to justify their application for access on the grounds of relevance or otherwise (although those representing Mr Raji has been prepared to do so). His Honour took the view that listing the material on a disclosure schedule made it ipso facto disclosable.

12. The defence are now seeking an order from HHJ Hurley for the disclosure of all the material in the possession of the United States law enforcement agencies, subject to legal privilege and public interest immunity.

13. The position of the CPS in response to the defence application is one of neutrality, although the CPS hopes that all unused material in the United States relevant to the defence is disclosed to them. The CPS is concerned that if the defence are unable to gain access to such material they will rely on this to argue that the proceedings in England are unfair and that their clients have been prejudiced. If such an argument was accepted by HHJ Elwen it could result in English proceedings being stayed as an abuse of process.

14. The CPS have no observations as to whether the deposition of Joan Ojomo ought to be continued, but wish to be present if there is a continuation.

J L TURNILL
Senior Crown Prosecutor
Horseferry Road Branch

ml
21 October 1999

IN THE SOUTHWARK CROWN COURT

CASE NO. T980950

BETWEEN

REGINA

V

1. FRANK MARTINS
2. OLADELE HAMMED RAJI

ORDER OF HIS HONOUR JUDGE ELWEN DATED 8TH OCTOBER 1999

UPON HEARING Counsel for the Defendants, Frank Martins and Hammed Oladele Raji and Counsel for the Crown in respect of an application for disclosure and inspection of evidence held by the American authorities involved in the investigation of alleged co-conspirators of the Defendants in America.

IT IS HEREBY ORDERED that the Defendants are entitled to the disclosure and inspection sought from the American authorities contained in the Disclosure Schedule and numbered items 398 to 698 subject to any claim as to privilege, immunity, or otherwise as may be asserted by those with possession of the documents and upheld by the appropriate American judicial authority.

IT IS FURTHER REQUESTED that this matter be expedited in the United States of America in view of the 90 day continuance time limit on the OJOMO deposition expiring on 4 November 1999 and the mention of this case on 12 November 1999 in the United Kingdom.

/s/ [Illegible]
HIS HONOUR JUDGE C. ELWEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:
FEBRUARY 8, 1999 LETTER
ROGATORY FROM THE
CROWN COURT AT
SNARESBROOK
(LONDON)

CASE NO.:
99-1562-CTV-HURLEY

ORDER DENYING FURTHER RELIEF
ABSENT AN EXPRESS REQUEST FROM
THE BRITISH CROWN COURT

THIS CAUSE came before the court upon receipt of a letter rogatory from the Crown Court sitting at Southwark, His Honour Elwen, J. presiding. In response, this court appointed a commissioner, permitted the parties to take the deposition of Ms. Joan Ojomo, and transmitted numerous documents and tape recordings to the Crown Court for potential use in a criminal case pending in that court. Apparently not satisfied with what they have obtained, defense counsel are seeking to reopen the Ojomo deposition and obtain additional documents. Upon consideration, it is

ORDERED and ADJUDGED that all further relief is denied without prejudice to the parties' right to bring the matter to the attention of His Honour Judge Elwen in the Crown Court. If the parties can demonstrate to Judge Elwen's satisfaction that the interests of justice would be served by additional discovery in the United States, this court stands ready to respond to any request issued by its sister court in Britain. And it is further

ORDERED and ADJUDGED that counsel for the parties shall refrain from engaging in "litigation by letter." All matters brought before this court shall be in the form of a motion, with appropriate caption and case number, and a certificate of service indicating that a copy has been provided to opposing counsel.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 4th day of October, 1999.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 99-1562-CIV-HURLEY
CASE NO. 96-6171-CR-HURLEY(S)

IN RE:
FEBRUARY 8, 1999 LETTER
ROGATORY FROM THE
CROWN COURT AT
SNARESBROOK (LONDON)
CONCERNING R v.
OLUMBUMMI WOOD,
MERION OGUNMUYIWA,
FRANK MARTINS AND
OLADELERAJI
_____/

ORDER

THIS CAUSE is before the Court after a Hearing on Wednesday, July 14, 1999 with all the parties present. The United States Attorney at the hearing voluntarily agreed to provide the following items to the Court:

(A) duplicate tapes of minimized conversations between Victoria Martins in the United Kingdom and Joan Ojomo in Hollywood, Florida, intercepted during the period of court-ordered interceptions from August 2 through October 31, 1996;

(B) copies of arrest interviews and any post-arrest interviews of the subjects arrested in the United States; and

(C) copies of subpoenaed bank records pertaining to an account of Joan Ojomo. The United States Attorney understands that the Court may forward these materials

to Judge Elwen at the Crown Court, Snakesbrook (London), United Kingdom, pursuant to Judge Elwen's letter rogatory, for use in a pending criminal proceeding in that Court.

Upon due consideration it is,

ORDERED AND ADJUDGED that:

1. The United States Secret Service and the United States Attorney is authorized to make and provide copies of the lawfully-intercepted conversations to this Court, which may then forward these copies to Judge Elwen, in accordance with the letter rogatory and for use solely in the criminal proceeding in the Snakesbrook Crown Court.

2. The United States Attorney is authorized to provide the bank account information, previously subpoenaed by a federal grand jury, to the Court, which may then forward this information to Judge Elwen, in accordance with the letter rogatory and for use solely in the criminal proceeding in the Snakesbrook Crown Court.

3. In response to this Court's subpoena, the American Express Company will provide the requested documentation to the Court, which may then forward this information to Judge Elwen, in accordance with the letter rogatory and for use solely in the criminal proceeding in the Snakesbrook Crown Court.

DONE AND ORDERED in chambers at West Palm Beach, Florida this 20th day of July, 1999.

/s/ Daniel T. K. Hurley
DANIEL T. K. HURLEY
UNITED STATES DISTRICT JUDGE

[LOGO]

THE CROWN COURT AT
SNARESBROOK
75 HOLLYBUSH HILL
SNARESBROOK
LONDON, E11 1QW
Telephone 081-982 5500
Dir. Line 081-982

Our Ref:
Your Ref:

To the Competent Judicial Authority
Southern District of Florida
United States of America

26th February 1999

Dear Sir

R v. Olumbummi Wood, Merion Ogunmuyiwa, Frank Martins and Oladele Raji

His Honour Judge Elwen, one of her Majesty's Circuit Judges, sitting in the Crown Court, presents his compliments to the Competent Judicial Authorities of the Southern District of Florida and has the honour to inform them of the following facts and respectfully submits an official request for assistance in obtaining the information, documents and materials mentioned below.

Under the laws of England and Wales, the United Kingdom can offer reciprocity to the United States of America, since, by virtue of the Criminal Justice (International Co-operation) Act 1990, the Secretary of State for Home Affairs can require a court to take evidence for use in any criminal proceedings instituted or criminal investigation being carried on in the United States.

The trial of Olumbimmi Wood, Merion Ogunmuyiwa, Frank Martins and Oladele Raji (together "the Defendants") is due to commence before a jury at the Crown Court sitting at Southwark on 4 May 1999. A copy of the indictment on which they stand charged and to which they have severally pleaded not guilty is attached hereto. His Honour Judge Elwen is the designated trial judge.

The indictment charges the Defendants with having conspired together with Joan Ojomo, Blessing Egbarin, Matthew Olaniyan, Sunny Ehinlaye, Adeniye Allison and others (together "the co-conspirators") to defraud various banking institutions by cloning credit cards and then representing that they were entitled to use those cards.

It is part of the English criminal process that the prosecution is under a duty at common law to disclose to the defence, subject to any sustainable claims to public interest immunity and the like, all material in its possession or under its control, which, among other things, is relevant or possibly relevant to an issue in the case. Such issues necessarily include the existence or otherwise of the conspiracy alleged, whether any one or more or all of the Defendants is a party to that conspiracy and what direct evidence, if any, there is of contacts between any one or more or all of the Defendants and any one or more or all of the Co-conspirators. Those defending Mr Raji understand that the proceedings pending in England are connected with Case Number 96 6171 which is before your court. They reasonably believe that there are in the possession, custody or control of the undermentioned persons documents and other material, which will or may be relevant to the defence of Mr Raji and which throw light on the issues in the case against him.

The conspiracy of which Mr Raji is said to be a party was transatlantic in nature involving inside agents in the United States accessing the security system of American Express and stealing confidential customer information which was then passed on to other conspirators in the U.S. and the U.K. Genuine AMEX cards were cloned and used by the conspirators to steal vast sums of money from those accounts via the world-wide system of Automatic Teller Machines (ATM's) and by other methods. it is alleged that between 1 January 1996 and 30 October 1996 a total loss of about $1,400,000.00 was incurred.

By June 1996 the American Express Company (AMEX) 777 American Express Way, Plantation, Florida had determined that it had suffered losses at ATM's in London of $1,000,000.00.

Joan Ojomo and Blessing Egbarin both employees of AMEX (the insiders) had been accessing credit card holder's accounts that were not within the scope of their employment. They had accessed the vast majority of accounts within 24 to 48 hours of those accounts being fraudulently used to access cash at ATM's in London.

On 10 June 1996 AMEX advised the United States Secret Service of Ojomo and Egbarin's activities. The Secret Service contacted the United States Attorney's office and requested that a Grand Jury investigation be initiated. AMEX agreed to co-operate with the government and keep Ojomo and Egbarin at their present positions. This allowed investigators to do a historic as well as an on going investigation of the fraudulent activity.

The investigation of the case in America generated a considerable body of material. For example, AMEX prepared schedules of all accounts which suffered fraud in the U.K.

Eighteen AMEX numbers were listed in an address book found at Mr Raji's home address. It is alleged that five accounts were accessed by Ojomo and that the total fraud perpetrated on these accounts was something in the region of $5374.87, from ATM's predominantly located in Barking East London (near where Mr Raji lives).

Collection of Ojomo's garbage revealed that she was taking home large quantities of AMEX credit card holder numbers and names. Subpoenaed telephone records of the telephone at Ojomo's residence revealed that the account was in a false name and that Ojomo had made calls to London, England and Lagos, Nigeria.

On 2 August 1996 District Judge Roettger signed an order authorising surveillance of Omojo's [sic] phone. During this "wire tap", it was determined that Ojomo was taking internal card holder information home with her from AMEX and selling the information to various street brokers of credit card information throughout the U.S. She was also giving it to her boyfriend Bazil, who was determined to be a major seller of credit card information in the U.S. and London.

On 30 August 1996 the court authorised a new interception on a cellular telephone of Bazil and continued interception of Ojomo's telephone. Through the interception of Bazil's telephone, investigators determined that he was selling information provided by Ojomo to Abimola Adekunle, Abimbola Harun, Omojide Aiyebola, Bamikole

Laniyan in New York and Adeniyi Alison in London. The information that was sold could be re-encoded on the magnetic stripe on the back of any credit card. The re-encoded card could then be used at any ATM that accepts American Express cards to access cash.

From the Court authorised interceptions in September, it was determined that stolen credit cards were being used by the group. Court authorised search warrants were obtained in order to do "sneak and peaks" of packages mailed to Bazil. The searches revealed four stolen credit cards sent from Kehinde Thompson to Bazil. These cards were paid for by Western Union Money grams.

Through another court authorised search warrant it was discovered that Ojomo mailed pages of AMEX account numbers to Sarumi, in Philadelphia. Through court authorised intercepts, investigators determined that Ojomo sold this information to Sarumi. The court authorised interceptions also revealed that Ojomo was also selling credit card information to Adenifuja in California.

Computer records of AMEX [illegible] that Blessing Egbarin had accessed accounts in the AMEX computer system which shortly thereafter, were fraudulently used in London, Amsterdam and the United States. These accounts had fraud on them of over $200,000.

A majority of these losses occurred between January 1996 and June 1996. The remaining loss of $300,000 occurred between July 1996 and October 1996.

The persons believed to be in possession of or to have custody or control of relevant documents and other materials are:

Jeffrey Kay, Assistant United States Attorney, US Department of Justice, Southern District of Florida, 500 East Broward Boulevard, Fort Lauderdale, FL 33394;

Detective Jorge Espinosa, USSA Task Force, US Department of Justice, Southern District of Florida, 500 Broward Boulevard, Fort Lauderdale, FL 33394;

Henry Brandt, Vice President Human Resources', American Express Travel Related Services Company Inc., 330 Biscayne, Miami, FL 33132.

It will be asserted in his defence by Mr Raji that he was not party to the conspiracy alleged having, to his knowledge, had no communications nor any concert with any one or more or all of the Co-conspirators. Those defending Mr Raji have, therefore, a direct interest in the documents, information and materials mentioned below.

The court is of the opinion that for the due determination of the prosecution pending before it, Thomas E Scott, Jorge Espinosa and Henry Brandt should be directed by the Competent Judicial Authorities to produce, as the case may be, the following:

- the relevant computer printouts and any other unused material relating to the amounts withdrawn, dates, times, and places of withdrawals
- audit trails/computer logs relating to all documents that were accessed by these two conspirators and relate to this conspiracy during the relevant period
- all schedules and copies of the till roles of the relevant ATM's referred to in the Crown's opening note
- Ojomo's itemised bill for the period in question
- the Ojomo "wire tap" tapes

- the tapes or transcripts of the interception of the Brazil [sic] Cellular telephone tapes
- computer printouts (audit trails) of the accounts accessed by Egbarin
- tapes and transcripts of Ojomo, Bazil and Egbarin's interviews with the police following arrest
- any witness statements that may be relevant to the issues in the Defendants case

Those acting on behalf of the Defendant Raji would respectfully request the aforementioned assistance.

Accordingly the Court respectfully requests that the Competent Judicial Authorities make such orders as are appropriate to require the persons named above to produce to the Court the documents, materials and information indicated and to transmit to the Court all original material so obtained. If it is not possible to transmit original material then it is requested that certified copies be provided.

The Court undertakes that if original material is transmitted it will at all times be kept in the safe custody of the Court in England. The Court further undertakes to return to the United States on the conclusion of the criminal proceedings in England all that original material to which this request relates.

The Court undertakes that any documents transmitted as a result of this request or the information contained in them will be used only in the course of the ordinary criminal process and not for a prosecution or investigation of a political or military nature. No direct or indirect use will be made of such documents or the information contained in them in repect of violations of customs

duties, regulations forbidding the export of capital or dealing with exchange control or provisions restraining the import, export or transmission of certain merchandise. No information will, therefore, be furnished to or brought to the knowledge of the tax authorities of the United Kingdom or other authorities charged with administrative or enforcement duties in relation to taxes, customs or exchange control. This undertaking also applies to the transmission of information to similar authorities in third countries.

The Court takes this opportunity to renew to the Competent Judicial and Legal Authorities in the United States of America the expression of the highest consideration and assures those Authorities of reciprocal attention, adding its thanks in advance to the Competent Judicial Authority of the Southern District of Florida for its attention to this request.

Yours faithfully,

/s/ [Illegible]

[LOGO]

Our Ref:

Your Ref:

THE CROWN COURT AT SNARESBROOK
75 HOLLYBUSH HILL
SNARESBROOK
LONDON, E11 1QW
Telephone 081-982-5500
Dir. Line 081-982

To the Competent Judicial Authority
Southern District of Florida
United States of America

8th February 1999

Dear Sir

R v. Olumbummi Wood, Merion Ogunmuyiwa, Frank Martins and Oladele Raji

His Honour Judge Elwen, one of Her Majesty's Circuit Judges, sitting in the Crown Court, presents his compliments to the Competent Judicial Authorities of the Southern District of Florida and has the honour to inform them of the following facts and respectfully submits an official request for assistance in obtaining the information, documents and materials mentioned below.

Under the laws of England and Wales, the United Kingdom can offer reciprocity to the United States of America, since, by virtue of the Criminal Justice (International Cooperation) Act 1990, the Secretary of State for Home Affairs can require a court to take evidence for use in any criminal proceedings instituted or criminal investigation being carried on in the United States.

The trial of Olumbimmi Wood, Merion Ogunmuyiwa, Frank Martins and Oladele Raji (together "the Defendants") is due to commence before a jury at The Crown Court sitting at Southwark on (4th May 1999). A copy of the indictment on which they stand charged and to which

they have severally pleaded not guilty is attached hereto. His Honour Judge Elwen is the designated trial judge.

The indictment charges the Defendants with having conspired together and with Joan Ojomo, Blessing Egbarin, Matthew Olaniyan, Sunny Ehinlaye, Adeniye Allison and others (together "the Co-conspirators") to defraud various banking institutions by cloning credit cards and then representing that they were entitled to use those cards.

It is part of the English criminal process that the prosecution is under a duty at common law to disclose to the defence, subject to any sustainable claims to public interest immunity and the like, all material in its possession or under its control, which, among other things, is relevant or possibly relevant to an issue in the case. Such issues necessarily include the existence or otherwise of the conspiracy alleged, whether any one or more or all of the Defendants is a party to that conspiracy and what direct evidence, if any, there is of contacts between any one or more or all of the Defendants and any one or more or all of the Co-conspirators. Those defending Mr Wood and Mr Martins understand that proceedings are pending in the United States against the Co-conspirators in connection with the same conspiracy. They reasonably believe that there are in the possession, custody or control of the undermentioned persons documents and other material, which will or may be relevant to the defence of Mr Wood and Mr Martins and which throws light on the issues in the case against them.

The persons believed to be in possession of or to have custody or control of relevant documents and other materials are:

Thomas E Scott, United States Attorney, US Department of Justice, Southern District of Florida, 500 East Broward Boulevard, Fort Lauderdale, FL 33394;

Detective Jorge Espinose, USSA Task Force, US Department of Justice, Southern District of Florida, 500 Broward Boulevard, Fort Lauderdale, FL 33394;

Henry Brandt, Vice President Human Resources, American Express Travel Related Services Company Inc., 330 Biscayne, Miami, FL 33132.

It will be asserted in their respective defences by Mr Wood and Mr Martins that they are not parties to the conspiracy alleged having, to their knowledge, had no communications nor any concert with any one or more or all of the Co-conspirators. Those defending Mr Wood and Mr Martins have, therefore, a direct interest in the documents, information and materials mentioned below.

The court is of the opinion that for the due determination of the prosecution pending before it, Thomas E Scott, Jorge Espinose and Henry Brandt should be directed by the Competent Judicial Authorities to produce, as the case may be, the following:

- all documents relating to the Co-conspirators;
- all documents relating to the [sic] Sebastian Brasil, alleged by the prosecuting authorities in the United States to have conspired with the Co-conspirators;
- all documents relating to the investigation by American Express within the United States culminating in the arrest of Joan Ojomo and Sebastian Brasil;

- all audio tapes and transcriptions thereof containing covertly recorded conversations between the Co-conspirators;
- all documents evidencing money transfers made to and by Joan Ojomo in her own name or any of her aliases of funds said to be the proceeds of the conspiracy as charged in the United States.

Accordingly the Court respectfully requests that the Competent Judicial Authorities make such orders as are appropriate to require the persons named above to produce to the Court the documents, materials and information indicated and to transmit to the Court all original material so obtained. If it is not possible to transmit original material then it is requested that certified copies be provided.

The Court undertakes that if original material is transmitted it will at all times be kept in the safe custody of the Court in England. The Court further undertakes to return to the United States on the conclusion of the criminal proceedings in England all that original material to which this request relates.

The Court undertakes that any documents transmitted as a result of this request or the information contained in them will be used only in the course of the ordinary criminal process and not for a prosecution or investigation of a political or military nature. No direct or indirect use will be made of such documents or the information contained in them in respect of violations of customs duties, regulations forbidding the export of capital or dealing with exchange control or provisions restraining the import, export or transmission of certain merchandise. No information will, therefore, be furnished to or

brought to the knowledge of the tax authorities of the United Kingdom or other authorities charged with administrative or enforcement duties in relation to taxes, customs or exchange control. This undertaking also applies to the transmission of information to similar authorities in third countries.

The Court takes this opportunity to renew to the Competent Judicial and Legal Authorities in the United States of America the expression of the highest consideration and assures those Authorities of reciprocal attention, adding its thanks in advance to the Competent Judicial Authority of the Southern District of Florida for its attention to this request.

Yours faithfully,

/s/ [Illegible]

His Honour Judge Elwen

United States Department of State
Washington, D.C. 20520

April 27, 1999

The Honorable Edward B. Davis
Chief Judge
United States District Court
Southern District of Florida
Federal Courthouse Square
301 North Miami Avenue
Miami, FL 33128-7788

Dear Judge Davis:

Enclosed for your reference is a copy of the April 22, 1999 diplomatic note (number 26/99) from the British Embassy requesting the assistance of the United States Government in securing documentary evidence needed by defendants in London in the case of Regina versus Olumbummi Wood et al.

Pursuant to 28 USCS Section 1781(a)(1) (enclosed), we are also sending you the February 8, 1999 letter rogatory from the Crown Court at Snaresbrook (London). This letter rogatory was enclosed with the diplomatic note cited in the preceding paragraph. Furthermore, I am also enclosing for your consideration a copy of Section 92.54 of Chapter I of Title 22 of the Code of Federal Regulations wherein a definition of a letter rogatory is provided.

As you will note from 28 USCS Section 1781(b)(1), the documentation requested can be furnished directly by your office, or if you elect, the Department of State will transmit the executed letter rogatory to the British Embassy; however, given the fact that time appears to be

of the essence, we would suggest that you remit the documents directly to the Crown Court at Snaresbrook.

Please note that the delay in furnishing this request to you was due in large measure to the fact that it (i.e., the request) was initially sent by the British Embassy to the United States Department of Justice in accordance with the provisions of the 1995 U.S.-U.K. Treaty on Mutual Legal Assistance on Criminal Matters. It must be noted, however, that this treaty does not embrace requests by defendants for judicial assistance.

The British point of contact in this matter is Kevin J. Finnerty, a consul at the British Embassy here in Washington D.C. Mr. Finnerty's telephone number is 202-588-7806.

I would like to thank you in advance for your assistance in this matter. Please feel free to contact me at 202-647-2617 with any questions.

Sincerely,

/s/ Edward A. Betancourt
Edward A. Betancourt
Director
Office of Policy Review and Interagency Liaison

Enclosures:
As stated.

NOTE NO 26/99

CON/376/3/99

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to request the assistance of the American authorities in producing evidence sought by the defence of Snaresbrook Crown court in the case of Regina versus Olumbummi Wood et al.

The trial of Olumbummi Wood, Merion Ogummuyiwa, Frank Martins and Oladele Raji (together "the Defendants") is due to commence before a jury at The Crown Court sitting at Southwark on 4 May 1999.

In support of this request a copy of the indictment on which they stand charged and to which they have severally pleaded not guilty is attached hereto. His Honour Judge Elwen is the designated trial judge.

Her Majesty's Embassy avail themselves of this opportunity to renew to the Department of State the assurance of their highest consideration.

(SEAL)
British Embassy
Washington
22 April 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-1562-CIV-HURLEY

In re:
FEBRUARY 8, 1999 LETTER ROGATORY FROM THE CROWN COURT AT SNARESBROOK

_____/

TRANSCRIPT OF HEARING ON OCTOBER 21, 1999

* * *

[p. 23] THE COURT: Let me ask you this, did you turn over the wiretap conversations to defense counsel in the case which you prosecuted from this district?

MR. KAY: Disclosure was made to all the defense counsel in this district, tapes that they particularly asked for were provided, transcripts of the wiretap conversations that we were going to use in – on our direct cases, as anticipated, were turned over to defense counsel in the United States.

THE COURT: Have those been turned over to counsel in this case?

MR. KAY: No, Your Honor.

THE COURT: How can you possibly be prejudiced by turning them over to defense counsel in this case?

MR. KAY: Under the Wiretap Statute, the way we look at it, Your Honor, there's no provision under Title

3 of the Wire Tap Statute that authorizes the government to turn over those wiretaps to defense counsel.

THE COURT: Except by court order.

[p. 24] MR. KAY: By court order.

THE COURT: Okay. So, I can order you to turn those over.

MR. KAY: Now, under the MLAT request that C.P.S. asked us for, that what's in the file. When they asked us for those tapes, I had to go to Judge Hurley and seek his authority to disclose those ten tapes to the C.P.S. which Judge Hurley authorized. Okay?

THE COURT: As long as they're willing to pay for transcripts or tapes, basically it's no skin off your nose if they're turned over. It's not going to hurt any pending investigation.

MR. KAY: I advise the court that there are 5,000 interceptions of which over 2,500 are pertinent – were decided pertinent at the time, and at least 98% of those are in Nigerian language.

THE COURT: Okay.

I'm not paying for them. So, if they're willing to pay for them and they want them, my question to you is: Can it in any way, compromise an ongoing U.S. investigation by turning over these thousands of wiretap tapes?

MR. KAY: Our investigation is complete, Judge. It won't jeopardize it.

THE COURT: Okay.

* * *